No. [illegible]

Supreme Court of the United States

OCTOBER TERM, 1960

JOHN P. McCLAIN, PETITIONER

v.

UNITED STATES OF AMERICA

[illegible] FOR A WRIT OF CERTIORARI TO THE FOURTH [illegible] COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[illegible]

[illegible] FOR THE UNITED STATES IN OPPOSITION

[illegible]

ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1078

JOHN T. McCLAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, having waived both a jury trial and special findings of fact, was convicted by the United States District Court for the Central District of California of having concealed and facilitated the transportation of seventy kilograms of marihuana, knowing it to have been imported contrary to law, in violation of 21 U.S.C. 176a. He was sentenced as a second offender to imprisonment for ten years. The conviction was affirmed on September 18, 1969, and rehearing was denied on November 10, 1969. Mr. Justice Douglas extended the time to file a petition for a writ of certiorari to January 8, 1970, but the petition was not filed until January 15, 1970. It is out of time under Rule 22–2 of the Rules of this Court.

375–383—70

The petition presents no issue of merit. The petitioner claims that his conviction should be reversed because the decision in *Leary* v. *United States,* 395 U.S. 6, held unconstitutional the presumption arising from possession created by 21 U.S.C. 176a. However, as the court below held, there was both ample evidence in this case to show that petitioner was aware that the marihuana involved had been unlawfully imported from Mexico, and every indication that the presumptions had not been relied upon.

Petitioner also claims that his prior conviction for violation of 26 U.S.C. 4704, for sale of heroin not from a stamped package, was invalid as violating his privilege against self-incrimination, and therefore should not form a predicate for sentence as a second offender. While the decision of this Court in *Minor* v. *United States,* No. 189, decided December 8, 1969, dealt with a prosecution under 26 U.S.C. 4705(a), its rationale serves to dispose of the claim of self-incrimination under the stamped package requirement of 26 U.S.C. 4704(a). It is therefore unnecessary even to consider questions of retroactivity.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

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